RECORD
AND
BRIEFS

Nos. 16-1436 & 16-1540

In the Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, et al.,
Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, et al.,
Respondents.

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES et al.,
Petitioners,

v.

STATE OF HAWAII, et al.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

BRIEF OF 161 TECHNOLOGY COMPANIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

ANDREW J. PINCUS
Counsel of Record
PAUL W. HUGHES
JOHN T. LEWIS
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

Table of Authorities ii

Interest of the *Amici Curiae* 1

Introduction and Summary of Argument 2

Argument 6

I. Immigration Drives American Innovation And Economic Growth. 6

II. The Order Harms The Competitiveness Of American Companies. 11

III. The Order Is Unlawful 16

A. Section 1182 does not empower the President to engage in wholesale, unilateral revision of the Nation's immigration laws. 16

1. The Order does not contain a finding sufficient to justify exercise of the President's authority under Section 1182(f). 17

2. The Order is invalid because of its broad scope and unlimited duration. 22

3. The Order conflicts with other provisions of the INA. 23

4. The Order is procedurally unreasonable. 25

B. The Order violates Section 1152's non-discrimination requirement. 27

C. This Court can, and must, adjudicate the scope of the President's authority. 30

Conclusion 32

Appendix A – List of *Amici Curiae* 1a

TABLE OF AUTHORITIES

Page(s)

Cases

Abourezk v. Reagan,
785 F.2d 1043 (D.C. Cir. 1986) 22, 24

Am. Overseas Airlines, Inc. v. *Civil Aeronautics Bd.*,
254 F.2d 744 (D.C. Cir. 1958) 19

Amoco Oil Co. v. *Envtl. Prot. Agency*,
501 F.2d 722 (D.C. Cir. 1974) 19

Bowen v. *Mich. Acad. of Family Physicians*,
476 U.S. 667 (1986) 30

Carlson v. *Landon*,
342 U.S. 524 (1952) 18

Crawford Fitting Co. v. *J. T. Gibbons, Inc.*,
482 U.S. 437 (1987) 28

Dalton v. *Specter*,
511 U.S. 462 (1994) 26, 31

Dames & Moore v. *Regan*,
453 U.S. 654 (1981) 30

Ethyl Corp. v. *Envtl. Prot. Agency*,
541 F.2d 1 (D.C. Cir. 1976) 19

Foley v. *Connelie*,
435 U.S. 291 (1978) 2

Franklin v. *Massachusetts*,
505 U.S. 788 (1992) 30

Heckler v. *Chaney*,
470 U.S. 821 (1985) 31

TABLE OF AUTHORITIES—continued

Page(s)

Indus. Union Dep't, AFL-CIO v. *Am. Petroleum Inst.*, 448 U.S. 607 (1980) 19

Kent v. *Dulles*, 357 U.S. 116 (1958) 18, 20

Kerry v. *Din*, 135 S. Ct. 2128 (2015) 23

Legal Assistance for Vietnamese Asylum Seekers v. *Dep't of State*, 45 F.3d 469 (D.C. Cir. 1995) 27

Meina Xie v. *Kerry*, 780 F.3d 405 (D.C. Cir. 2015) 28

Mobil Oil Expl. & Producing Se. Inc. v. *United Distribution Companies*, 498 U.S. 211 (1991) 19

Mojica v. *Reno*, 970 F. Supp. 130 (E.D.N.Y. 1997) 10

Motor Vehicle Mfrs. Assn. v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) 26

Nuclear Info. Res. Serv. v. *Nuclear Regulatory Comm'n*, 969 F.2d 1169 (D.C. Cir. 1992) 19

Olsen v. *Albright*, 990 F. Supp. 31 (D.D.C. 1997) 29, 30

Patel v. *Reno*, 134 F.3d 929 (9th Cir. 1997) 31

TABLE OF AUTHORITIES—continued

Page(s)

Saavedra Bruno v. *Albright*,
197 F.3d 1153 (D.C. Cir. 1999) 31

Sale v. *Haitian Ctrs. Council, Inc.*,
509 U.S. 155 (1993) 31

Texas v. *United States*,
809 F.3d 134 (5th. Cir. 2015) 27

United Distribution Companies v. *F.E.R.C.*,
88 F.3d 1105 (D.C. Cir. 1996) 19

United States ex rel. Knauff v. *Shaughnessy*,
338 U.S. 537 (1950) 30

United States v. *Mead Corp.*,
533 U.S. 218 (2001) 26

United States v. *Witkovich*,
353 U.S. 194 (1957) 18, 19

Vayeghan v. *Kelly*,
2017 WL 396531 (C.D. Cal. Jan. 29, 2017) 28

Whitman v. *Am. Trucking Ass'ns*,
531 U.S. 457 (2001) 18

Youngstown Sheet & Tube Co. v. *Sawyer*,
343 U.S. 579 (1952) 30

Zemel v. *Rusk*,
381 U.S. 1 (1965) 18, 20

Statutes, Rules and Regulations

5 U.S.C.
§ 553(b) 28
§ 553(c) 26, 28

TABLE OF AUTHORITIES—continued

Page(s)

8 U.S.C.
§ 1152(a)(1)(A) ..... *passim*
§ 1152(a)(1)(B) 28
§ 1182(a) 22, 24
§ 1182(a)(3)(B) 23
§ 1182(a)(3)(B)(i)(II) 23
§ 1182(f) ..... *passim*
§ 1185(a) 16, 17, 26

82 Fed. Reg.
8977 (2017) 4
13209 (2017) ..... *passim*

Pub. L. 114-113, div. O, tit. II, § 203, 129 Stat. 2242 (codified at 8 U.S.C. § 1187(a)(12)) 24

Miscellaneous

Americas Soc'y & Council of the Americas, *Bringing Vitality to Main Street* (2015) 7

Stuart Anderson, *Immigrants Flooding America with Nobel Prizes*, Forbes (Oct. 16, 2016) 8

Stuart Anderson, Nat'l Found. for Am. Pol'y, *Immigrants and Billion Dollar Startups* (Mar. 2016) 7

Stuart Anderson, Nat'l Found. for Am. Pol'y, *The Contributions of the Children of Immigrants to Science in America* (Mar. 2017) 9

TABLE OF AUTHORITIES—continued

Page(s)

Maksim Belenkiy & David Riker, *Face-to-Face Exports: The Role of Business Travel in Trade Promotion*, 51 J. Travel Res. 632 (2012) 14

BGRS, *Breakthrough to the Future of Global Talent Mobility* (2016) 13

Muzaffar Chishti & Claire Bergeron, Migration Pol'y Inst., *Post-9/11 Policies Dramatically Alter the U.S. Immigration Landscape* (Sept. 8, 2011) 4

Jeff Daniels, *Trump Immigration Ban Puts $20 Billion in Boeing Aircraft Sales to Iran, Iraq at Risk*, CNBC (Jan. 30, 2017) 14

Jordan Fabian, *DHS Analysis Found No Evidence of Extra Threat Posed by Travel-Ban Nations: Report*, The Hill (Feb. 24, 2017) ... 20

Robert W. Fairlie et al., Ewing Marion Kauffman Found., *The 2016 Kauffman Index: Startup Activity* (Aug. 2016) 7

Seth Fiegerman, *Former Google Exec Calls Trump Travel Ban an 'Enormous Problem,'* CNN Tech (Jan. 30, 2017) 13

Gallup, *Majority of Americans Identify Themselves as Third Generation Americans* (July 10, 2001) 2

Michael Greenstone & Adam Looney, The Hamilton Project, *Ten Economic Facts About Immigration* (Sept. 2010) 8

TABLE OF AUTHORITIES—continued

Page(s)

Elizabeth Grieco, U.S. Census Bureau, *The Foreign-Born Population in the United States* (2012) 2

Harv. Bus. Rev., *Strategic Global Mobility* (2014) 13

Nune Hovhannisyan & Wolfgang Keller, *International Business Travel: An Engine of Innovation?*, 20 J. Econ. Growth 75 (2015) 14

Brady Huggett, *US Immigration Order Strikes Against Biotech*, Trade Secrets (Feb. 7, 2017) 13

H.R. Rep. No. 89-745 (1965) 27, 28

Immigration Laws and Iranian Students, 4A Op. O.L.C. 133 (1979) 19

International Migration Outlook 2017, Org. Econ. Co-operation & Dev. 46 (41st ed. 2017) 15

John F. Kennedy, A Nation of Immigrants (1958) 2, 3

Lyndon B. Johnson, Remarks at the Signing of the Immigration Bill (Oct. 3, 1965) 10

Letter from Bradford L. Smith, President and Chief Legal Officer, Microsoft, to John F. Kelly, Sec'y of Homeland Sec., and Rex W. Tillerson, Sec'y of State (Feb. 2, 2017) 11

Abraham Lincoln, Fourth Annual Message (Dec. 6, 1864) 3

TABLE OF AUTHORITIES—continued

Page(s)

Kate M. Manuel, Cong. Research Serv., *Executive Authority to Exclude Aliens: In Brief* 6-10 (Jan. 23, 2017) 22

Laura Meckler, *Trump Administration Considers Far-Reaching Steps for 'Extreme Vetting,'* Wall St. J. (Apr. 4, 2017) 15

New Am. Econ., *Reason for Reform: Entrepreneurship* (Oct. 2016) 8

Pia Orrenius, George W. Bush Inst., *Benefits of Immigration Outweigh the Costs*, The Catalyst (2016) 8

Tara Palmeri & Bryan Bender, *U.S. Diplomats Warning GE's Major Deals in Iraq at Risk over Travel Ban*, Politico (Feb. 1, 2017) 14

Pew Research Center, *Second-Generation Americans: A Portrait of the Adult Children of Immigrants* (Feb. 7, 2013) 2

P'ship for a New Am. Econ., *Open For Business: How Immigrants Are Driving Small Business Creation in the United States*, Aug. 2012 7

P'ship for a New Am. Econ., *The "New American" Fortune 500* (2011) 6

Gopal Ratnam, *Trump's Travel Order Opens Door to Targeting More Countries*, Roll Call (Mar. 15, 2017) 12

TABLE OF AUTHORITIES—continued

Page(s)

Remarks at the Opening Ceremonies of the Statute of Liberty Centennial Celebration (July 3, 1986) 2

Jonathan Shieber, *Apple CEO Tim Cook Sent an Email to Employees about the Immigration Ban*, TechCrunch (Jan. 28, 2017) 11

S. Rep. No. 89-748 (1965) 27

Rex W. Tillerson, Sec'y of State (Feb. 2, 2017) 11

U.S. Chamber of Commerce, *Immigration: Myths and Facts* (2016) 8

U.S. Dep't of State, Office of the Historian, *The Immigration Act of 1924 (The Johnson-Reed Act)* 10

Vivek Wadhwa et al., *America's New Immigrant Entrepreneurs* (Jan. 4, 2007) 8

5 Woodrow Wilson, A History of the American People (1902) 9

INTEREST OF THE *AMICI CURIAE*

Amici curiae are 161 of the Nation's leading technology companies. *Amici* produce iconic goods and services that touch nearly every aspect of our lives—from business and finance to recreation and communication. Together, *amici* employ millions of Americans and contribute significantly to our country's economy. A complete list of *amici* is set forth in Appendix A.[1]

Amici are gravely concerned about the adverse effects of the Executive Order challenged in this case. As *amici* explain below, the Order makes it more difficult for them to hire the very best talent, to send their employees abroad, to grow their operations, and, fundamentally, to compete in the global economy. *Amici* believe that the Order will therefore stifle the Nation's economic growth and global competitiveness. *Amici* raised these concerns before the courts below.

Many of *amici*'s own stories reflect the benefits that immigrants bring to the Nation. Many of *amici* were founded by immigrants, virtually all employ immigrants, and every *amicus* recognizes that the American economy, and the Nation as a whole, thrives when it welcomes immigrants with properly calibrated policies.

---

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties' consents to the filing of *amicus curiae* briefs are on file with the Clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

America proudly describes itself as "a nation of immigrants." *Foley* v. *Connelie*, 435 U.S. 291, 294 (1978). We are: in 1910, 14.7% of the population was foreign born; in 2010, 12.9%.[2] A quarter of us have at least one parent who was born outside the country.[3] Close to half of us have a grandparent born somewhere else.[4] Nearly all of us trace our lineage to another country.

President Reagan, rededicating the Statue of Liberty in 1986, said "which of us does not think of * * * grandfathers and grandmothers, from so many places around the globe, for whom this statue was the first glimpse of America? * * * [A] special kind of people from every corner of the world, who had a special love for freedom and a special courage that enabled them to leave their own land, leave their friends and their countrymen, and come to this new and strange land to build a New World of peace and freedom and hope." Remarks at the Opening Ceremonies of the Statute of Liberty Centennial Celebration (July 3, 1986), https://goo.gl/1qwq5N.

The "contributions of immigrants," then-Senator John F. Kennedy explained, "can be seen in every aspect of our national life." John F. Kennedy, A Nation of Immigrants 4 (1958). "We see it in religion, in

---

[2] Elizabeth Grieco, U.S. Census Bureau, *The Foreign-Born Population in the United States* 3 (2012), https://goo.gl/PZ3pnE.

[3] Pew Research Center, *Second-Generation Americans: A Portrait of the Adult Children of Immigrants* 8 (Feb. 7, 2013), https://goo.gl/SRaXxc.

[4] Gallup, *Majority of Americans Identify Themselves as Third Generation Americans* (July 10, 2001), https://goo.gl/o7PRxv.

politics, in business, in the arts, in education, even in athletics and in entertainment." *Id.* There is "no part of our nation," he recognized, "that has not been touched by our immigrant background." *Id.*

President Lincoln, after signing into law the Act to Encourage Immigration, explained that immigration is "one of the principal replenishing streams which are appointed by Providence" to better the Nation—and therefore requires "effective national protection." Abraham Lincoln, Fourth Annual Message (Dec. 6, 1864), https://goo.gl/znf3iC.

Indeed, immigrants make many of the Nation's greatest discoveries and create some of the country's most innovative and iconic companies. Immigrants are among our leading entrepreneurs, politicians, artists, and philanthropists. The experience and energy of people who come to our country to seek a better life for themselves and their children—to pursue the "American Dream"—are woven throughout the social, political, and economic fabric of the Nation.

For decades, stable U.S. immigration policy has embodied the principles that we are a people descended from immigrants, that we welcome new immigrants, and that we provide a home for refugees seeking protection. At the same time, America has long recognized the importance of protecting ourselves against those who would do us harm. But it has done so while maintaining our fundamental commitment to welcoming immigrants—through increased background checks and other controls on people seeking to enter our country.[5]

---

[5] "In the decade since 9/11," immigration policy has incorporated, among other things, "major new border security and law enforcement initiatives, heightened visa controls and screening

On January 27, 2017, "[o]ne week after inauguration and without interagency review" (J.A. 1166), President Donald J. Trump signed Executive Order 13,769. See 82 Fed. Reg. 8977 (2017) ("First Executive Order"). That Order altered immigration policy in significant respects: it barred nationals of seven countries—Syria, Libya, Iran, Iraq, Somalia, Yemen, and Sudan—from entering the United States for at least 90 days (*id.* § 3(c)), with the possibility of expansion to additional countries (*id.* § 3(e)-(f)), and it gave the Secretaries of State and Homeland Security discretion to issue visas to affected nationals "on a case-by-case basis" (*id.* § 3(g)).

The First Executive Order "took immediate effect, causing great uncertainty as to the scope of the order." J.A. 1167. Even "federal officials themselves were unsure as to the scope of EO1, which caused mass confusion at airports and other points of entry." *Ibid.* After "[i]ndividuals, organizations, and states across the nation challenged the First Executive Order in federal court" (*id.* 174), it was enjoined on the basis of a number of constitutional and statutory defects.

On March 6, 2017, President Trump rescinded the First Executive Order and issued Executive Order 13,780. See 82 Fed. Reg. 13209 (2017) ("the Order"). The new Order bans nationals from six countries for 90 days beginning on March 16—the same

---

of international travelers and would-be immigrants, the collection and storage of information in vast new interoperable databases used by law enforcement and intelligence agencies, and the use of state and local law enforcement as force multipliers in immigration enforcement." Muzaffar Chishti & Claire Bergeron, Migration Pol'y Inst., *Post-9/11 Policies Dramatically Alter the U.S. Immigration Landscape* (Sept. 8, 2011), https://goo.gl/6rdagt.

countries as the first order, omitting Iraq, but subjecting nationals from Iraq to especially intensive scrutiny. Order §§ 2(c), 4. The Order's ban may be extended beyond 90 days and expanded to new countries deemed, based on unspecified criteria, not to provide sufficient information to the United States. *Id.* § 2(e)-(f). Any waiver from the ban remains subject to the largely unconstrained discretion of U.S. Customs and Border Protection. *Id.* § 3(c).

The Order effects a significant shift in the rules governing entry into the United States, and is inflicting substantial harm on American companies, their employees, and the entire economy. It hinders the ability of American companies to attract talented employees; increases costs imposed on business; makes it more difficult for American firms to compete in the international marketplace; and gives global enterprises a new, significant incentive to build operations—and hire new employees—outside the United States.

The Order also exceeds the President's authority under the Nation's immigration laws. To bar a class of aliens from the United States, the President must reasonably determine that their entry would be detrimental to the Nation, and then craft an order that reasonably addresses any threat that those individuals might pose. The Order here falls far short of these requirements—it neither explains why the targeted individuals' entry would be detrimental to the United States nor imposes reasonable restrictions.

For example, Congress has enacted detailed standards to prevent entry of terrorists into our country. The Order, "with vague words of national security" (J.A. 171), overrides those standards without any explanation, let alone sufficient justification.

Nor did the executive branch engage in the notice-and-comment procedures necessary before imposing sweeping, long-term changes on the Nation's immigration system.

Moreover, Congress in 1965 prohibited discrimination in immigration decisions on the basis of national origin precisely so that the Nation would not shut its doors to immigrants based on where they come from—but the Order does just that. It would turn the clock back and restore the national-origins system that Congress expressly abolished.

The Court accordingly should affirm the judgments below barring enforcement of the Order.

ARGUMENT

I. Immigration Drives American Innovation And Economic Growth.

The tremendous impact of immigrants on America—and on American business and the entire American economy—is not happenstance. People who choose to leave everything that is familiar and journey to an unknown land to make a new life necessarily are endowed with drive, creativity, determination—and just plain guts. The energy they bring to America is a key reason why the American economy has been the greatest engine of prosperity and innovation in history.

A. Immigrants are leading entrepreneurs. "The American economy stands apart because, more than any other place on earth, talented people from around the globe want to come here to start their businesses." P'ship for a New Am. Econ., *The "New American" Fortune 500*, at 5 (2011), http://goo.gl/yc0h7u. Indeed, "[i]mmigrants continue to be a lot

more likely than the native-born to become entrepreneurs." Robert W. Fairlie et al., Ewing Marion Kauffman Found., *The 2016 Kauffman Index: Startup Activity* 7 (Aug. 2016), https://goo.gl/6Wr5Mc.

Some of these businesses are large. "Immigrants have started more than half (44 of 87) of America's startup companies valued at $1 billion dollars"—so-called "unicorns"—"and are key members of management and product development teams in over 70 percent (62 of 87) of these companies." Stuart Anderson, Nat'l Found. for Am. Pol'y, *Immigrants and Billion Dollar Startups* 1 (Mar. 2016), https://goo.gl/Mk7iJM (emphasis added). Immigrants or their children founded more than 200 of the companies on the Fortune 500 list, including Apple, Kraft, Ford, General Electric, AT&T, Google, McDonald's, Boeing, and Disney. P'ship for a New Am. Econ., *supra*, at 1-2. Collectively, these companies generate annual revenue of $4.2 trillion and employ millions of Americans. *Id.* at 2.

Many of these businesses are small. "While accounting for 16 percent of the labor force nationally and 18 percent of business owners, immigrants make up 28 percent of Main Street business owners." Americas Soc'y & Council of the Americas, *Bringing Vitality to Main Street* 2 (2015), https://goo.gl/i9NWc9. These are "the shops and services that are the backbone of neighborhoods around the country." *Id.* In 2011, immigrants opened 28% of all new businesses in the United States. See P'ship for a New Am. Econ., *Open For Business: How Immigrants Are Driving Small Business Creation in the United States* 3, Aug. 2012, https://goo.gl/zqwpVQ.

Immigrant entrepreneurs come from all parts of the world. In 2014, "19.1 percent of immigrants from the Middle East and North Africa were entrepreneurs." New Am. Econ., *Reason for Reform: Entrepreneurship* 2 (Oct. 2016), https://goo.gl/QRd8Vb.

Immigrants also fuel the growth of the economy as a whole. "When immigrants enter the labor force, they increase the productive capacity of the economy and raise GDP. Their incomes rise, but so do those of natives." Pia Orrenius, George W. Bush Inst., *Benefits of Immigration Outweigh the Costs*, The Catalyst (2016), https://goo.gl/qC9uOc. Immigrants thus create new jobs for U.S. citizens "through the businesses they establish * * * [and] play an important role in job creation in both small and large businesses." U.S. Chamber of Commerce, *Immigration: Myths and Facts* 3 (2016), https://goo.gl/NizPEQ.

Immigrants are also innovators. Since 2000, more than one-third of all American Nobel prize winners in Chemistry, Medicine, and Physics have been immigrants. *See* Stuart Anderson, *Immigrants Flooding America with Nobel Prizes*, Forbes (Oct. 16, 2016), http://goo.gl/RILwXU. Among individuals with advanced educational degrees, immigrants are nearly three times more likely to file patents than U.S.-born citizens. Michael Greenstone & Adam Looney, The Hamilton Project, *Ten Economic Facts About Immigration* 11 (Sept. 2010), https://goo.gl/3zpdpn. By one estimate, non-citizen immigrants were named on almost a quarter of all U.S.-based international patent applications filed in 2006. Vivek Wadhwa et al., *America's New Immigrant Entrepreneurs* 4 (Jan. 4, 2007), https://goo.gl/wCIySz. And children of immigrants made up 83% of the top-performing students in the well-known Intel high school science

competition. Stuart Anderson, Nat'l Found. for Am. Pol'y, *The Contributions of the Children of Immigrants to Science in America* 1-3, 5, 12 (Mar. 2017), https://goo.gl/7noMyC.

Indeed, inventions and discoveries by immigrants have profoundly changed our Nation. Some, like alternating current (Nikola Tesla), power our world. Others, like nuclear magnetic resonance (Isidore Rabi) and flame-retardant fiber (Giuliana Tesoro), save lives. And yet others, like basketball (James Naismith), blue jeans (Levi Strauss), and the hot dog (Charles Feltman), are classic Americana.

B. America's success in attracting and incorporating immigrants into our society is unrivaled in the world.

To be sure, America has in the past deviated from this ideal. Woodrow Wilson in 1902 decried the immigration to the United States of "multitudes of men of the lowest class from the south of Italy and men of the meaner sort out of Hungary and Poland, men out of the ranks, where there was neither skill nor energy nor any initiative of quick intelligence; and they came in numbers which increased from year to year, as if the countries of the south of Europe were disburdening themselves of the more sordid and hapless elements of their population." 5 Woodrow Wilson, A History of the American People 212-213 (1902).

The Immigration Act of 1917 (also known as the Literacy Act) barred immigration from parts of Asia. And in 1924, the Johnson-Reed Act significantly restricted Italian and Jewish immigration to the United States in an effort to "preserve the ideal of U.S. homogeneity." U.S. Dep't of State, Office of the His-

torian, *The Immigration Act of 1924 (The Johnson-Reed Act)*, https://goo.gl/5foFNZ. See also *Mojica* v. *Reno*, 970 F. Supp. 130, 145 (E.D.N.Y. 1997) (Weinstein, J.) ("It is well known that prejudice against the Irish, the Chinese, the Japanese, the Italians, the Jews, the Mexicans and others emerged as these groups emigrated in substantial numbers.").

But the march of time has discredited these laws and policies. Since World War II, American immigration policy has been one of "tolerance, equality and openness" in which "the United States has revived its traditional rhetoric of welcome—and matched its words with action." *Id.* (quotation omitted).

In 1965, Congress enacted the Immigration and Nationality Act (INA). That law, which established the immigration framework that remains in place today, eliminated the policy of national quotas. In signing the INA, President Johnson stated:

> America was built by a nation of strangers. * * * And from this experience, almost unique in the history of nations, has come America's attitude toward the rest of the world. We, because of what we are, feel safer and stronger in a world as varied as the people who make it up—a world where no country rules another and all countries can deal with the basic problems of human dignity and deal with those problems in their own way.

Lyndon B. Johnson, Remarks at the Signing of the Immigration Bill (Oct. 3, 1965).

These principles have defined American immigration policy for the past 50 years. The beneficiaries are not just the new immigrants who chose to come

to our shores, but American businesses, workers, and consumers, who gain immense advantages from immigrants' infusion of talents, energy, and opportunity.

II. The Order Harms The Competitiveness Of American Companies.

The Order abandons the principles that have undergirded U.S. immigration policy for more than half a century—clear, settled standards and constrained discretion. It introduces sudden changes without an opportunity for affected parties to inform decision-makers of the consequences of those changes before their adoption, provides unclear standards for implementation, and leaves entirely to individual officers' discretion the exercise of case-specific waiver authority.

The Order will make it more difficult and expensive for U.S. companies to recruit, hire, and retain some of the world's best employees. It will disrupt ongoing business operations—making it harder for U.S. companies to compete in today's global markets. And it will inhibit investment in the United States. That will inflict significant harm on American business, innovation, and economic growth.[6]

A. The Order establishes a system of "case-by-case" exceptions from its ban on nationals from six

---

[6] Several major companies reported substantial disruptions from the First Executive Order. *E.g.*, Letter from Bradford L. Smith, President and Chief Legal Officer, Microsoft, to John F. Kelly, Sec'y of Homeland Sec., and Rex W. Tillerson, Sec'y of State, at 5 (Feb. 2, 2017), https://goo.gl/AZtcFV; Jonathan Shieber, *Apple CEO Tim Cook Sent an Email to Employees about the Immigration Ban*, TechCrunch (Jan. 28, 2017), https://goo.gl/qzXDJO.

countries, but leaves the application of those exceptions to the discretion of Customs and Border Protection—setting forth a non-exhaustive list of circumstances in which such exceptions "*could be* appropriate." Order § 3(c) (emphasis added). Because individual immigration officers retain broad discretion in issuing these individual-by-individual exceptions, it is unclear what exemptions will be actually be given, or why—and whether that authority is being exercised fairly and without discrimination or favoritism.

Even more important, the Order provides that the ban, and its accompanying standardless exception process, may be expanded to include an unspecified number of additional countries if those nations do not provide information the Secretary of State deems necessary to approve visas. See Order § 2(e)-(f). The Department of Homeland Security purportedly "has already identified more than a *dozen* countries whose nationals could be blocked from traveling to the United States" on this basis.[7] Individuals and businesses thus face the significant risk that new, as-yet-unidentified countries will be added to the ban—all without any governing standard. And, given that the second Order expanded on the time period of the first, nothing prevents a further extension.[8]

The Order will have the immediate, adverse consequences of making it far more difficult and expensive for U.S. companies to hire the world's best talent

---

[7] Gopal Ratnam, *Trump's Travel Order Opens Door to Targeting More Countries*, Roll Call (Mar. 15, 2017) (emphasis added), https://goo.gl/6bFYHm.

[8] Indeed, as the government notes, President Trump has already extended—by memorandum—the ban for 90 days past when any injunctions against the Order are lifted or stayed. Pet. Br. 37.

and compete effectively in the global marketplace. Businesses and employees have little incentive to go through the laborious process of sponsoring or obtaining a visa, and relocating to the United States, if an employee may be unexpectedly halted at the border. Skilled individuals will not wish to immigrate to this country if they may be cut off without warning from their spouses, grandparents, relatives, and friends—they will not pull up roots, incur significant economic risk, and subject their family to considerable uncertainty to immigrate to the United States in the face of this instability.[9] The Order therefore significantly disadvantages U.S. companies in the global competition for talent.[10]

B. The Order's bans on travel also will significantly impair day-to-day business. The marketplace for today's businesses is global. Companies routinely send employees across borders for conferences, meetings, or job rotations, and invite customers, clients, or users from abroad. Global mobility is critical to businesses whose customers, suppliers, users, and workforces are spread all around the world.[11]

Global business travel enables employees to develop new skills, take on expanded roles, and stay abreast of new technological or business developments. It also facilitates new markets and business

---

[9] Seth Fiegerman, *Former Google Exec Calls Trump Travel Ban an 'Enormous Problem,'* CNN Tech (Jan. 30, 2017), https://goo.gl/vNVgLt.

[10] See Brady Huggett, *US Immigration Order Strikes Against Biotech*, Trade Secrets (Feb. 7, 2017), https://goo.gl/OLHfN1.

[11] See, *e.g.*, BGRS, *Breakthrough to the Future of Global Talent Mobility* (2016), http://goo.gl/ZhIxSr; Harv. Bus. Rev., *Strategic Global Mobility* (2014), http://goo.gl/AV3nhJ.

partnerships. Indeed, one study has shown that each additional international business trip increases exports from the United States to the visited country by, on average, over $36,000 per year.[12]

But the Order will mean that many companies and employees (both inside and outside the United States) would be unable to take advantage of these opportunities. The Order will prevent companies from inviting customers to the U.S. and prevent employees from outside the U.S. from traveling here. That is true even for persons or countries not currently covered by the Order because there is no way to know whether or when a given country may be added to the no-entry list.

The Order also could lead to retaliatory actions by other countries, which would seriously hinder U.S. companies' ability to do business or negotiate business deals abroad. U.S. companies' deals have already been threatened.[13]

C. The same authority invoked to justify the Order may be used in the future to impose additional measures that will harm U.S. businesses. For example, once the 90-day suspension period has ended, foreign travelers could be required "to provide cellphone contacts and social-media passwords and an-

---

[12] Maksim Belenkiy & David Riker, *Face-to-Face Exports: The Role of Business Travel in Trade Promotion*, 51 J. Travel Res. 632, 637 (2012). See also Nune Hovhannisyan & Wolfgang Keller, *International Business Travel: An Engine of Innovation?*, 20 J. Econ. Growth 75 (2015).

[13] See, *e.g.*, Jeff Daniels, *Trump Immigration Ban Puts $20 Billion in Boeing Aircraft Sales to Iran, Iraq at Risk*, CNBC (Jan. 30, 2017), https://goo.gl/uT2goG; Tara Palmeri & Bryan Bender, *U.S. Diplomats Warning GE's Major Deals in Iraq at Risk over Travel Ban*, Politico (Feb. 1, 2017), http://goo.gl/nhj9CZ.

swer questions about their ideology, according to Trump administration officials, measures that could intrude into the lives of millions of foreigners."[14] Such requirements would powerfully discourage travel to the United States, and risk exposing to third parties sensitive business information of U.S. companies contained on travelers' devices.

D. For all of these reasons, the Order will incentivize both immigration to and investment in foreign countries rather than the United States. Highly skilled individuals will be more interested in working elsewhere, in places where they and their colleagues can travel freely and with assurance that their immigration status will not suddenly be revoked. Other countries have already begun "actively pursuing foreign investors and entrepreneurs, with the aim of increasing investment and creating jobs for the benefit of the national economy." *International Migration Outlook 2017*, Org. Econ. Co-operation & Dev. 46 (41st ed. 2017).

Non-U.S. companies have taken note, too. Multinational companies will have strong incentives, including pressure from their own employees, to base operations outside the United States or to move or hire employees and make investments abroad. Foreign companies will have significantly less incentive to establish operations in the United States and to hire American citizens, because the Order will preclude the ability of those companies to employ their world-class talent within their U.S. subsidiaries. Ul-

---

[14] Laura Meckler, *Trump Administration Considers Far-Reaching Steps for 'Extreme Vetting,'* Wall St. J. (Apr. 4, 2017), https://goo.gl/D3H1tF.

timately, American workers and the economy will suffer as a result.

Of course, the federal government can and should implement targeted, appropriate adjustments to our country's immigration system to enhance the Nation's security. But a broad, open-ended ban—together with the indication that the ban could be expanded to other countries, or that additional, different restrictions could be adopted, without notice—will undermine rather than protect American interests, producing serious, widespread adverse consequences without any reasonable relationship to the goal of making the country more secure.

III. The Order Is Unlawful.

The Order is unlawful for several reasons. We focus on two. *First*, the Immigration and Nationality Act does not authorize the use of Executive Orders to fundamentally change the character of the Nation's immigration laws. *Second*, the Order violates the non-discrimination requirement of Section 1152.

A. Section 1182 does not empower the President to engage in wholesale, unilateral revision of the Nation's immigration laws.

Petitioners rely primarily on the President's power under the INA to "suspend the entry of * * * any class of aliens" whose entry he finds "would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). They also point to Section 1185(a), which permits the President to issue "reasonable rules, regulations, and orders" and "limitations and exceptions" for the entry of immigrants and non-immigrants. Those grants of authority, petitioners

claim, give the President unilateral authority to ban any group of aliens, for any reason.

But these statutory provisions do not confer unlimited authority. The text and context of Sections 1182(f) and 1185(a) make clear that an exercise of authority must be reasonable and must be limited to a specific, emergency situation. The Order here exceeds those limitations.

First, the Order purports to ban a group of aliens from the United States without making the requisite finding that such aliens will be detrimental to the interests of the Nation. *Second*, the Order is the polar opposite of a targeted response to an emergency situation. In sixty-five years, no President has ever invoked Sections 1182(f) and 1185(a) to bar the admission into the United States of tens of millions of people, based solely on their nationality, for months—and perhaps years. *Third*, the Order conflicts with the specific statutory provision that establishes standards for preventing entry by terrorists without any reasonable justification for displacing those congressionally enacted standards. And *fourth*, the Order's broad changes to immigration procedures can only be imposed through the rulemaking process.

1. The Order does not contain a finding sufficient to justify exercise of the President's authority under Section 1182(f).

The text, context, and history of Section 1182(f) all point to the same conclusion: the Order exceeds the President's authority under the statute because it does not adequately explain why the aliens it bars would harm the United States.

The text of Section 1182(f) is clear: the President may only suspend the entry of aliens if he "finds"

that their entry "would be detrimental to the interests of the United States." Congress could not have made it more plain that it did not intend to confer upon the President unbounded power to bar aliens. That Congress required a sufficient finding of detriment before the President may bar a class of aliens is unsurprising, for Congress may delegate power only if "the executive judgment is limited by adequate standards." *Carlson* v. *Landon*, 342 U.S. 524, 544 (1952). An "intelligible principle" must guide the exercise of delegated power. *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

For this reason, the Court has consistently identified limits on discretionary authority delegated by Congress, even when confronted with a clause that seems "limitless" when read "in isolation and literally." *United States* v. *Witkovich*, 353 U.S. 194, 198-202 (1957). See, *e.g.*, *Zemel* v. *Rusk*, 381 U.S. 1, 17 (1965) (rejecting the view that "simply because a statute deals with foreign relations, it can grant the Executive totally unrestricted freedom of choice"); *Kent* v. *Dulles*, 357 U.S. 116, 127, 128 (1958) (considering the power to issue passports, the Court observed that the President's authority was "expressed in broad terms," but refused to "impute to Congress * * * a purpose to give [the President] unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose").

Here, moreover, the text contains a clear limitation on presidential action: the President's authority is contingent on finding that the specified aliens' entry would be "detrimental to the interests of the United States." A reasonable finding by the President of the requisite "detriment[]" thus "constitute[s] a condition precedent to embarking upon the exercise

of regulatory power"—and the President's action is invalid in the absence of such a reasonable determination. *Amoco Oil Co.* v. *Envtl. Prot. Agency*, 501 F.2d 722, 736 (D.C. Cir. 1974). Indeed, courts in a variety of contexts analyze whether the executive branch has reasonably made the findings specified by Congress as prerequisites for executive action. See, *e.g.*, *Mobil Oil Expl. & Producing Se. Inc.* v. *United Distribution Companies*, 498 U.S. 211, 227 (1991); *Indus. Union Dep't, AFL-CIO* v. *Am. Petroleum Inst.*, 448 U.S. 607, 642 (1980); *United Distribution Companies* v. *F.E.R.C.*, 88 F.3d 1105, 1139 (D.C. Cir. 1996); *Nuclear Info. Res. Serv.* v. *Nuclear Regulatory Comm'n*, 969 F.2d 1169, 1178 (D.C. Cir. 1992); *Ethyl Corp.* v. *Envtl. Prot. Agency*, 541 F.2d 1, 11-12 (D.C. Cir. 1976); *Am. Overseas Airlines, Inc.* v. *Civil Aeronautics Bd.*, 254 F.2d 744, 749 (D.C. Cir. 1958).

The President must therefore meet a standard of reasonableness in exercising his Section 1182(f) authority. *Witkovich*, 353 U.S. at 198-202 (holding that authority to request information that the Attorney General "may deem fit and proper" had an implicit limit of reasonableness). That conclusion accords with the longstanding interpretation of the statute by the Executive Branch. See *Immigration Laws and Iranian Students*, 4A Op. O.L.C. 133, 140 (1979) (recognizing that any suspension the President makes under Section 1182(f) "must meet the test of 'reasonableness'"); Hawaii Br. 36-37.

In addition, the permissible justifications for the exercise of this authority are limited by the context in which Congress acted when it adopted the language codified in Section 1182(f). Congress drew that text from a series of narrowly drawn wartime statutes, proclamations, and regulations permitting the

President to exclude only limited classes of aliens, for limited periods of time, to address emergency situations. See Hawaii Br. 31-36. That context restricts the circumstances in which the President may employ this authority. *Zemel*, 381 U.S. at 17-18 (statute "must take its content from history"); *Kent*, 357 U.S. at 128 (grounds for refusing passport limited to those that "it could fairly be argued were adopted by Congress in light of prior administrative practice").

The Order transgresses this limitation on presidential authority. It provides barely any justification for why the admission of aliens it bans from the United States—based on nothing more than their national origin—would be detrimental to the Nation. Its express aim is to "protect the Nation from terrorist activities by foreign nationals." Order, pmbl. But "[t]he Order makes no finding that nationality alone renders entry of this broad class of individuals a heightened security risk to the United States." J.A. 1200; *see also id.* at 256 (Keenan, J., concurring).

Certainly there is no reasonable basis to conclude that nearly *every* national of Iran, Libya, Somalia, Sudan, Syria, and Yemen, absent specific evidence to the contrary, will commit terrorist activities upon entry to the United States.[15] Indeed, the ban applies to

---

[15] Indeed, the administration itself did not think so until it found itself embroiled in litigation. As the Ninth Circuit noted, "a draft report from DHS, prepared about one month after EO1 issued and two weeks prior to EO2's issuance, concluded that citizenship 'is unlikely to be a reliable indicator of potential terrorist activity' and that citizens of countries affected by EO1 are '[r]arely [i]mplicated in U.S.-[b]ased [t]errorism.'" J.A. 1173 (alterations in original). See also Jordan Fabian, *DHS Analysis Found No Evidence of Extra Threat Posed by Travel-Ban Nations: Report*, The Hill (Feb. 24, 2017), https://goo.gl/6jp7FX.

hundreds of thousands of students, employees, and family members of citizens who have been previously admitted to the United States—and thus who the United States, after careful, individualized review, concluded that their admission to the United States posed no security risk to the Nation.

The past history of admitting these individuals is especially important because "[t]here is no finding that present vetting standards are inadequate." J.A. 1198. The Order simply recites well-known facts regarding these countries *as a whole*, ignoring that no alien from these countries admitted to the U.S. has engaged in terroristic activity.

The Order's purported rationale falls short for other reasons. It is both overinclusive and underinclusive: its focus on nationality "could have the paradoxical effect of barring entry by a Syrian national who has lived in Switzerland for decades, but not a Swiss national who has immigrated to Syria during its civil war." J.A. 1203 (quotation omitted). And its reliance on the exclusion of several listed countries from the Visa Waiver Program is wholly unconvincing: "[r]ather that setting an outright ban on entry of nationals from those countries, Congress * * * instead required that persons who are nationals of or have recently traveled to these countries enter the United States with a visa." *Id.* at 1204.

It is no surprise that petitioners fall back on a different argument: that the Order is necessary because the government lacks "sufficiently complete and reliable information" about which aliens are likely to engage in terrorism. Pet'r's Br. 47. But "the statutory text plainly requires more than vague uncertainty regarding whether their entry might be detrimental to our nation's interest." J.A. 257 (Kee-

nan, J., concurring). Claimed "uncertainty" cannot constitute a reason for banning 140 million people from the United States based on nothing more than their nationality.

2. The Order is invalid because of its broad scope and unlimited duration.

No other President has ever used Section 1182(f) to presumptively prohibit the entry of millions of foreign nationals solely on the basis of their nationality. For that reason as well, the Order is unlawful.

Section 1182(f) is a gap-filler provision, authorizing the President to take targeted action to respond to an emergency situation. *Abourezk v. Reagan*, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986) (explaining that Section 1182(f) "provides a safeguard against the danger posed by any particular case or class of cases that is not covered by one of the [inadmissibility] categories in [S]ection 1182(a)").

That was the context in which the language contained in Section 1182(f) was enacted. See pages 19-20, *supra*. And it is how past Presidents have employed this authority since 1952, each time issuing a targeted restriction, usually limited to dozens or hundreds of people on the grounds that each affected person had engaged in culpable conduct, such as human trafficking, illegal entry, or corruption. See Kate M. Manuel, Cong. Research Serv., *Executive Authority to Exclude Aliens: In Brief* 6-10 (Jan. 23, 2017), https://goo.gl/D0bRkS. This consistent executive branch practice is powerful evidence of the limited reach of the provision, and it is consistent with the context of Section 1182(f)—as one provision in an extraordinarily detailed set of statutory rules, elabo-

rated in administrative regulations, that govern the issuance of visas and entry of aliens.

The Order here deviates from this settled practice. It is broadly applicable—to millions of people; it lasts for at least 90 days, which extends past the time period specified in the initial order, and it may last much longer; and it targets people based on nationality, rather than on the basis of culpable conduct. For this reason as well, the Order is unreasonable and therefore unlawful.

3. The Order conflicts with other provisions of the INA.

The Order also displaces the INA's specific requirements for excluding aliens on the basis that they might commit acts of terrorism. See 8 U.S.C. § 1182(a)(3)(B). That statute—"a complex provision with 10 different subsections" that "cover[s] a vast waterfront of human activity" (*Kerry* v. *Din*, 135 S. Ct. 2128, 2145 (2015) (Breyer, J., dissenting))—provides a detailed scheme for determining when an alien may be excluded based on a potential to commit terrorist acts. Specifically, an alien who has never before engaged in terrorist activities or joined a terrorist organization may be excluded only if the government has a "reasonable ground to believe" that the alien "is likely to engage after entry in any terrorist activity." 8 U.S.C. § 1182(a)(3)(B)(i)(II).

The Order's system of ad hoc waivers turns that provision on its head. Instead of creating a presumption of *admittance* absent any "reasonable ground" to think an alien will commit terrorist activities—as Section 1182(a)(3)(B) requires—the Order creates a presumption of *exclusion* and leaves it to Customs and Border Protection to decide whether an alien has

demonstrated, "to the officer's satisfaction," that he or she would not threaten national security. Order § 3(c).

The Order thus eliminates Congress's substantive requirement that there be reasonable grounds to exclude an alien on the basis of the threat of future acts of terrorism. And it does so without even attempting to explain why changed circumstances or other facts make Congress's determinations inadequate to protect the Nation.[16]

As construed by petitioners, therefore, Section 1182(f) would allow the President to rewrite *all* of Congress's detailed rules for when aliens may be excluded, set forth in detail in Section 1182(a). "[T]he statute lists thirty-three distinctly delineated categories that conspicuously provide standards to guide the Executive in its exercise of the exclusion power." *Abourezk*, 785 F.2d at 1051. But if the President may ban groups of aliens at will, even for reasons that contradict the standards specified by Congress, he or she could "thereby effectively nullify[] that complex body of law." J.A. 254 (Keenan, J., concurring). See also *Abourezk*, 785 F.2d at 1057 ("The Executive may not use subsection (27) to evade the limitations Congress appended to subsection (28)."); IRAP Br. 51-52.

Indeed, were the Court to uphold the Order here, a President could use Section 1182(f) to rewrite the

---

[16] In addition, Congress in 2015 specifically considered the risk that travelers from these countries might engage in terrorism, and addressed it by exempting them from the visa waiver program. See Pub. L. 114-113, div. O, tit. II, § 203, 129 Stat. 2242 (codified at 8 U.S.C. § 1187(a)(12)). That congressional determination, too, is overridden by the Order without any justification or explanation.

immigration laws in their entirety, prescribing via executive order an entire new regime—with standards for issuing visas and excluding aliens wholly different from those prescribed by Congress. Section 1182(f) does not, as the government would have it, empower the President to nullify duly enacted immigration laws at will. If it did, such a delegation of authority would pose severe constitutional concerns.

4. The Order is procedurally unreasonable.

The comprehensive revision of the immigration system effected by the Order—and the executive orders that apparently will follow—improperly circumvents Congress's directive that significant changes in immigration rules be implemented through notice and comment rulemaking.

Sections 2(a) to 2(f) of the Order effectively create a new immigration system pursuant to which the Secretary of Homeland Security, the Secretary of State, and the Director of National Intelligence determine what unspecified "information" countries must share with the United States in order to allow their nationals to enter this country. Then, these officials may recommend to the President an expansion or extension of the ban on entry to the United States.

In addition, the Order confers effectively unconstrained discretion on consular officers and customs officials to "decide on a case-by-case basis to authorize the issuance of a visa to, or to permit the entry of, a foreign national for whom entry is otherwise suspended." Order § 3(c). Other than listing a series of nonexclusive considerations, the Order neither proscribes a procedural mechanism for this exercise of discretion, nor establishes substantive guideposts to govern the exercise of this broad discretion.

Congress expressly identified the need for rulemaking in the INA, authorizing the President to impose "reasonable rules, regulations, and orders." 8 U.S.C. § 1185(a). But no such rulemaking occurred here, notwithstanding the Order's broad applicability. Moreover, while the Administrative Procedure Act does not generally apply to the President's actions (see *Dalton* v. *Specter*, 511 U.S. 462, 469 (1994)), it *does* apply to the subsequent conduct of the Departments of State and Homeland Security, which must ultimately implement the Order.

Rulemaking "foster[s] * * * fairness and deliberation" (*United States* v. *Mead Corp.*, 533 U.S. 218, 230 (2001)), and gives "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(c). See also *Motor Vehicle Mfrs. Assn.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (rulemaking process ensures that an agency has not "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency").

Here, the notice-and-comment process is particularly important given the huge range of individuals and entities affected by these rules, such as families seeking to reunite, or even just to have the opportunity to visit one another; businesses wishing to interact with customers, to enable employees to obtain experience at their home offices in the United States, or to hire individuals with expertise not otherwise available; and cultural institutions planning performances by artists from outside the United States.

For these reasons, Section 1182(f) does not provide a means of circumventing the ordinary rulemaking process for promulgating legal principles of general applicability. Cf. *Texas* v. *United States*, 809 F.3d 134, 177 (5th. Cir. 2015) (requiring use of notice-and-comment rulemaking in immigration context), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016).

B. The Order violates Section 1152's nondiscrimination requirement.

The Order separately contravenes 8 U.S.C. § 1152(a)(1)(A), which provides that "no person shall * * * be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." "Congress could hardly have chosen more explicit language" to "unambiguously direct[] that no nationality-based discrimination" shall occur with respect to immigration. *Legal Assistance for Vietnamese Asylum Seekers* v. *Dep't of State*, 45 F.3d 469, 473 (D.C. Cir. 1995), *vacated on other grounds*, 519 U.S. 1 (1996).

Congress enacted Section 1152 "to eliminate the 'national origins system as the basis for the selection of immigrants to the United States.'" J.A. 1209 (quoting H.R. Rep. No. 89-745, at 8 (1965)). That system, as President Johnson explained, "was incompatible with our basic American tradition" that we "ask not where a person comes from but what are his personal qualities." H.R. Rep. No. 89-745 at 11. Congress replaced the national origins system with "a new system of selection designed to be fair, rational, humane, and in the national interest" (S. Rep. No. 89-748, at 13 (1965)), based largely on "the advantage to

the United States of the special talents and skills of the immigrant." H.R. Rep. No. 89-745, at 18.

On its face, the Order discriminates on the basis of nationality and therefore violates Section 1152. Although the Order purports to bar only the entry of designated foreign nationals, "it would have the specific effect of halting the issuance of visas to nationals of the Designated Countries." J.A. 140. That is precisely what Section 1152 prohibits. *Ibid.* Accord *Vayeghan* v. *Kelly*, 2017 WL 396531, at *1 (C.D. Cal. Jan. 29, 2017).[17]

Section 1152 must be understood to constrain the powers granted to the President under Section 1182(f). As the Ninth Circuit explained, Section 1152 was enacted after Section 1182, "and sets a limitation on the President's broad authority to exclude aliens—he may do so, but not in a way that discriminates based on nationality." J.A. 1214. See, *e.g.*, *Crawford Fitting Co.* v. *J. T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) ("[W]here there is no *clear* intention

---

[17] Although petitioners no longer press this argument, the Order cannot be defended as creating "procedures for the processing of immigrant visa applications" (8 U.S.C. § 1152(a)(1)(B)). Cf. J.A. 1216. That provision, by its terms, confers power upon the Secretary of State, not the President. And the Secretary must exercise that authority in conformity with the provisions of the Administration Procedure Act, including providing notice and opportunity for comment by interested parties. 5 U.S.C. § 553(b)-(c). Cf. *Meina Xie* v. *Kerry*, 780 F.3d 405, 408 (D.C. Cir. 2015) (applying the APA to the Secretary of State's visa processing). More importantly, the Secretary's authority is subject to Section 1152's prohibition on discrimination. It therefore—at most—permits the executive branch to regulate the manner in which foreign nationals can receive visas or enter the United States, but does not authorize a sweeping ban on nationals from six countries.

otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.") (quotation omitted). And Section 1152 also "specifically identifies exemptions from the non-discrimination mandate, implying that unmentioned sections are not exempted." J.A. 1214.

The government asserts that there is no conflict between the Order and Section 1152 because an alien who is barred under the Order "is denied an immigrant visa because he is ineligible to receive one as someone barred from entering the country," and "not because he is suffering the type of nationality-based discrimination" that Section 1152 prohibits. Pet. Br. 52. That, Judge Wynn explained below, "is nonsensical." J.A. 313 (Wynn, J., concurring). It makes no difference that the aliens who are banned by the Order cannot receive visas because they are barred from entering the United States when the *reason* for that bar is their national origin.

The President may not use Section 1182 to circumvent Congress's express prohibition on nationality-based discrimination by shifting the step in the process at which that discrimination occurs. Congress could not have intended to prohibit discrimination at the embassy, but permit it at the airport gate. Congress instead commanded "that government must not discriminate against particular individuals because of the color of their skin or the place of their birth," because such discrimination "is unfair and unjustified" wherever it occurs. *Olsen* v. *Albright*, 990 F. Supp. 31, 39 (D.D.C. 1997).

In sum, the Order exceeds the President's authority under Section 1182—but even if it does not, it

nonetheless violates the ban on nationality-based discrimination codified in Section 1152.[18]

C. This Court can, and must, adjudicate the scope of the President's authority.

"Congress intends the executive to obey its statutory commands and, accordingly, * * * it expects the courts to grant relief when an executive agency violates such a command." *Bowen* v. *Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 (1986). For this reason, "[r]eview of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive." *Franklin* v. *Massachusetts*, 505 U.S. 788, 828 (1992) (Scalia, J., concurring) (citing *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952)).

It is fundamental that the President's exercise of his statutory powers is not above review by this Court. In *Dames & Moore* v. *Regan*, for instance, the Court addressed claims that President Reagan's executive order suspending certain claims against Iran exceeded the President's statutory powers, holding that the order fell within that authority. 453 U.S. 654, 666-667 (1981). See also *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544-547 (1950) (reviewing on the merits claims that a presidential proclamation violated two statutes). Respondents

---

[18] To be sure, the text of Section 1152 only prohibits discrimination with respect to immigrant visas. But the basic nondiscrimination principle that it embodies is reflected throughout U.S. law. *Olsen*, 990 F. Supp. at 33 (addressing nonimmigrant visas). Section 1182(f) therefore does not confer authority to discriminate on this basis with respect to nonimmigrant visas in the absence of a reasonable justification for displacing this fundamental principle. Such a justification is lacking here.

here raise a similar claim, arguing that the Order exceeds the President's limited authority under Section 1182(f).

To be sure, there is a narrow exception to judicial review where a statute gives the President unlimited discretion to make a discrete and specific decision. See *Dalton*, 511 U.S. at 477. This rule reflects the general principle that review is unavailable when a statute is "drawn in such broad terms that in a given case there is no law to apply." *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985).

The President's discretion under Section 1182(f) is not unlimited, as it was in *Dalton*. Instead, the President's authority is constrained by the requirement that he make an adequate finding of detriment, and that he exercise his power under Section 1182 reasonably. Accord *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187-188 (1993) (assessing legality of President's exercise of Section 1182(f) authority). The Order is unlawful—and the Court should say so.

Petitioners' invocation of the so-called "consular nonreviewability" doctrine is similarly misplaced. Pet. Br. 24-26. The question here does not involve an individualized, discretionary "decision" by a "consular official" to "issue or withhold a visa." *Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999). Rather than any discretionary determination, it is the scope of the President's authority to establish broad standards banning wholesale immigration from certain specified nationalities. Such determinations are reviewable. Cf. *Patel* v. *Reno*, 134 F.3d 929, 932 (9th Cir. 1997) ("The Patels are challenging the consul's authority to suspend their visa applications, not challenging a decision within the discretion of the consul. Therefore, jurisdiction exists to consider

whether the consulate has the authority to suspend the visa applications."). And, given that many respondents are not themselves foreign nationals, the harms addressed in this case span far beyond individualized entry or admissions decisions.

To the extent that courts ever hesitate to review statutory claims about individualized consular officer determinations, that has no bearing on the nature of the claims raised here.

CONCLUSION

The judgments of the courts of appeals should be affirmed.

Respectfully submitted.

ANDREW J. PINCUS
Counsel of Record
PAUL W. HUGHES
JOHN T. LEWIS
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amici Curiae

SEPTEMBER 2017

APPENDIX

APPENDIX A
LIST OF *AMICI CURIAE*

1. 6Sense Insights, Inc.
2. A Medium Corporation
3. Adobe Systems Incorporated
4. AdRoll, Inc.
5. Affirm, Inc.
6. Airbnb, Inc.
7. Akamai Technologies, Inc.
8. AltSchool, PBC
9. Amazon.com, Inc.
10. Ampush LLC
11. Appboy, Inc.
12. AppNexus Inc.
13. Asana, Inc.
14. Atlassian Corp. Plc
15. Autodesk, Inc.
16. Automattic/WordPress.com
17. Azavea Inc.
18. Big Tooth Ventures
19. Bloomberg L.P.
20. Box, Inc.
21. Brightcove Inc.
22. Brocade Communications Systems, Inc
23. Bungie, Inc.

24. CareZone Inc.
25. Casper Sleep Inc.
26. Castlight Health
27. Cavium, Inc.
28. Checkr Inc.
29. Chegg, Inc.
30. Chobani , LLC
31. Citrix Systems, Inc.
32. Civis Analytics, Inc.
33. ClassPass Inc.
34. Cloudera, Inc.
35. Cloudflare, Inc.
36. Codecademy
37. Color Genomics, Inc.
38. Copia Institute
39. Credit Karma, Inc.
40. DocuSign, Inc.
41. DoorDash
42. Dropbox, Inc.
43. eBay Inc.
44. Edmodo, Inc.
45. Electronic Arts Inc.
46. EquityZen Inc.
47. Etsy Inc.
48. Eventbrite Inc.

49. Evernote
50. Facebook, Inc.
51. Fastly, Inc.
52. Fitbit, Inc.
53. Flipboard, Inc.
54. Fuze, Inc.
55. General Assembly Space, Inc.
56. GitHub, Inc.
57. Glassdoor
58. Google Inc.
59. GoPro Inc.
60. Greenhouse Software, Inc.
61. Greenough Consulting Group
62. Groupon, Inc.
63. Gusto
64. Harmonic Inc.
65. Hewlett Packard Enterprise
66. HP Inc.
67. IDEO
68. Imgur, Inc.
69. Indiegogo, Inc.
70. Intel Corporation
71. Kargo
72. Kickstarter, PBC
73. Knotel

74. Lam Research Corporation
75. Levi Strauss & Co.
76. Linden Research, Inc. d/b/a Linden Lab
77. LinkedIn Corporation
78. Lithium Technologies, LLC
79. Lyft, Inc.
80. Lytro, Inc.
81. Managed By Q Inc.
82. Mapbox, Inc.
83. Maplebear Inc. d/b/a Instacart
84. Marin Software Incorporated
85. Medallia, Inc.
86. Medidata Solutions, Inc.
87. Microsoft Corporation
88. Minted, LLC
89. Molecule Software, Inc.
90. MongoDB, Inc.
91. Motivate International Inc.
92. Mozilla Corporation
93. MPOWERD Inc.
94. NetApp, Inc.
95. Netflix, Inc.
96. NETGEAR, Inc.
97. New Relic, Inc.
98. NewsCred, Inc.

99. Nextdoor.com, Inc.
100. NIO USA, Inc.
101. nTopology
102. Oath, Inc.
103. Optimizely, Inc.
104. Pandora Media, Inc.
105. Patreon, Inc.
106. PayPal Holdings, Inc.
107. Pinterest, Inc.
108. Pixability, Inc.
109. Plaid Technologies, Inc.
110. Planet Labs Inc.
111. Postmates Inc.
112. Pure Storage, Inc.
113. Quantcast Corp.
114. Quora, Inc.
115. RealNetworks, Inc.
116. Red Hat, Inc.
117. Reddit, Inc.
118. Redfin Corporation
119. Rocket Fuel Inc.
120. Rocket Lawyer Incorporated
121. RPX Corporation
122. SaaStr, Inc.
123. Salesforce.com, Inc.

124. Shutterstock, Inc.
125. Singularity University
126. Snap Inc.
127. Space Exploration Technologies Corp.
128. Spokeo, Inc.
129. SpotHero, Inc.
130. Spotify USA Inc.
131. Square, Inc.
132. Squarespace, Inc.
133. Strava, Inc.
134. Stripe, Inc.
135. SugarCRM
136. Sunrun, Inc.
137. SurveyMonkey Inc.
138. TaskRabbit, Inc.
139. Tech:NYC
140. Tesla, Inc.
141. Thumbtack, Inc.
142. TransferWise Inc.
143. TripAdvisor, Inc.
144. Tumblr
145. Turbonomic, Inc.
146. Turo Inc.
147. Twilio Inc.
148. Twitter Inc.

149. Uber Technologies, Inc.
150. Udacity, Inc.
151. Upwork Inc.
152. Verizon Communications Inc.
153. Via
154. Warby Parker
155. The Wikimedia Foundation, Inc.
156. Work & Co.
157. Workday, Inc.
158. Y Combinator Management, LLC
159. Yelp Inc.
160. Zendesk, Inc.
161. Zymergen Inc.